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THE USE OF HEARSAY EVIDENCE IN CRIMINAL PROCEEDINGS: AN UPDATED FRAMEWORK

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I. Introduction

1 When the Evidence Act[2] was amended in 2012, significant changes were made to the provisions concerning hearsay to broaden the gateways of admissibility. At the same time, an exclusionary discretion was also introduced. Singapore's courts have since made various important pronouncements on these changes, and this article provides an updated framework for both prosecutors and defence counsel regarding the admissibility of hearsay in criminal proceedings. Because it complements the authors' earlier article on similar fact,[3] readers are assumed to be broadly familiar with the features of the Evidence Act's admissibility paradigm concerning its inclusionary scheme, the bifurcation of general and specific relevancy provisions, and s 2(2).[4]

1 While the author is an AGC Professorial Fellow, the views expressed in this article are his own.
2 Cap 97, 1997 Rev Ed.
3 Chen Siyuan & Chang Wen Yee, "The Use of Similar Fact in Criminal Proceedings: An Updated Framework" [2020] SAL Prac 25.
4 The provision states: "All rules of evidence not contained in any written law, so far as such rules are inconsistent with any of the provisions of this Act, are repealed."

II. Framework for admitting hearsay

2 Under the common law, hearsay can be broadly defined as assertions that are made out of court but tendered to prove the truth of their contents.[5] Such assertions can take the form of oral statements, documents, or conduct, and they can be express or implied and relate to either positive or negative facts. The Evidence Act, however, was conceptualised to directly identify exceptions to the hearsay rule without defining hearsay[6] or setting out its grounds of exclusion. With that in mind, the authors will first consider s 32[7] – a specific relevancy provision, and also the most likely gateway for most hearsay evidence, given the reductive treatment that tends to be given to the question of what constitutes hearsay (*ie*, out-of-court statements). To be clear, though the Evidence Act generally applies equally to civil and criminal proceedings, only the subsections that may be relevant to criminal proceedings are considered.

A. Section 32

(1) Section 32(1)(a)

3 This provision is essentially the same as its predecessor, and concerns the admissibility of statements made by a deceased that relates to either "the cause of his death, or… any of the circumstances of the transaction which resulted in his death". Unlike the common law position, such statements are relevant even if the person was not "under expectation of death" when making them. What is less clear is the cut-off point in time. In *Yeo Hock Cheng v R*,[8] a threat to kill the deceased made nine days before her murder was held to be inadmissible because the statement was too remote; in contrast, the statement made on

5 *Soon Peck Wah v Woon Che Chye* [1997] 3 SLR(R) 430 at [26].

6 Note that s 62 of the Evidence Act (Cap 97, 1997 Rev Ed), as clarified repeatedly by the courts, neither provides the definition of hearsay nor provides grounds for its exclusion.

7 The preambulatory portion of the provision states: "Subject to subsections (2) and (3), statements of relevant facts made by a person (whether orally, in a document or otherwise), are themselves relevant facts in the following cases".

8 [1938] MLJ 104.

the day of the murder requesting the deceased to disguise herself before she met the accused was admitted.

4 While contemporaneity is an obvious factor, the court is also likely to assess the relevance of the statement in the light of any potential connecting events. For instance, even if a threat to kill was made some time before it was carried out, it may be relevant to prove motive (under s 8 of the Evidence Act) or may be considered as being part of a single chain of events (under s 6). Whether the satisfaction of a general relevancy provision – in addition to the specific relevancy provision that is s 32 – suffices to obviate the application of the court's "interests of justice" discretion in s 32(3) would likely depend on the facts of each case.[9] This discretion would be considered in greater detail later.

*(2) Section 32(1)(*b*)*

5 This provision concerns statements "made by a person in the ordinary course of a trade, business, profession or other occupation". After the 2012 amendments, the presence of the statement-maker before the court is not even necessary before the relevant statement or document is admissible, signalling a partial shift from a declarant-centred analysis to that of a nature-of-statement analysis.[10]

6 More significantly, this ground now provides that past or present documents forming part of or constituting the business records kept in the course of a business or profession are admissible. This includes business invoices,[11] acknowledgements and receipts,[12] information in "market quotations, tabulations, lists, directories or other compilations",[13] copies of draft wills

9 As far as hearsay is concerned, the weight of authorities uniformly only requires one relevancy provision to be fulfilled, without more. Even outside hearsay, cases that hint at requiring the satisfaction of both general and specific relevancy – such as in *AD v AE* [2005] 2 SLR(R) 180 – are rare.

10 *Columbia Asia Healthcare Sdn Bhd v Hong Hin Kit Edward* [2016] 5 SLR 735 at [24]. *Cf* the illustrations to s 32, which clearly refer to hearsay-only situations.

11 *Columbia Asia Healthcare Sdn Bhd v Hong Hin Kit Edward* [2016] 5 SLR 735 at [26].

12 Evidence Act (Cap 97, 1997 Rev Ed) s 32(*b*)(ii).

13 Evidence Act (Cap 97, 1997 Rev Ed) s 32(*b*)(iii).

kept by law firms,[14] and data and raw material generated in experiments.[15]

7 Additionally, documents compiled based on information provided by other persons are included,[16] and multiple hearsay is theoretically possible.[17] While this provision tends to be used more often in civil proceedings, the Court of Appeal has warned against assuming that matters of admissibility – including the court's discretion under s 32(3) – would universally be treated more strictly in criminal cases as compared to civil cases.[18] The court will look at each case holistically.

(3) Section 32(1)(c)

8 This provision is essentially the same as its predecessor, and concerns the admissibility of statements that are made by individuals that are against their interests – provided they are aware that the statements are against their own interests.[19] In the criminal law context, such statements would be those that, if true, would expose or would have exposed the declarant to a criminal prosecution or to a suit for damages.[20] For instance, in *J Ravinthiran v Public Prosecutor*, the court held that out-of-court evidence of a third-party hitting the victim was admissible, since that could have rendered the third party criminally liable.[21] But like s 32(1)(*b*) – and indeed, ss 32(1)(*e*)–32(1)(*f*) as well, discussed below – there is no precondition that the statement-maker must be unavailable. The result may be that if the statement-maker is available, the evidence is *ipso facto* admissible under this provision, but if he is not, there is a higher chance to attract the s 32(3) discretion. This is probably true of ss 32(1)(*e*)–32(1)(*f*) too.

14 *The Law Society of Singapore v Lee Suet Fern* [2020] SGDT 1 at [85] and [135]. See also illustration (*c*) of s 32(1) of the Evidence Act (Cap 97, 1997 Rev Ed).
15 *Element Six Technologies Ltd v IIa Technologies Pte Ltd* [2020] SGHC 26 at [421].
16 Evidence Act (Cap 97, 1997 Rev Ed) s 32(*b*)(iv).
17 *Element Six Technologies Ltd v IIa Technologies Pte Ltd* [2020] SGHC 26 at [421].
18 *ANB v ANC* [2015] 5 SLR 522 at [29]–[30].
19 *Velstra Pte Ltd v Dexia Bank NV* [2005] 1 SLR(R) 154 at [40].
20 The first half of s 32(1)(*c*) pertains to pecuniary or proprietary interests of the statement-maker.
21 *J Ravinthiran v Public Prosecutor* [2004] SGHC 173 at [27]–[29].

*(4) Section 32(1)(*e*)*

9 This provision is essentially the same as its predecessor, and concerns the admissibility of statements made by persons who have "special means of knowledge" with respect to "the existence of any relationship by blood, marriage or adoption" between parties. What constitutes "special means" has been interpreted to include genealogical records and records of births, deaths, and marriages.[22] The identity of the statement-maker must be known before he can be deemed to have special means of knowledge.[23] This is premised on the need to know how the statement-maker came to acquire the information.[24] Unsurprisingly then, the statement-maker will often be a relative of the individual concerned.[25]

*(5) Section 32(1)(*f*)*

10 This provision is essentially the same as its predecessor, and concerns the admissibility of statements with respect to "the existence of any relationship by blood, marriage or adoption between persons deceased" – so unlike s 32(1)(*e*) above, it would not apply to statements relating to relationships between living and deceased persons.[26] The statement may be made "in any will or deed relating to the affairs of the family to which any such deceased person belonged", tombstones, and family portraits, but the examples given in the provision are non-exhaustive and would be given a broad interpretation, subject, presumably, to the *ejusdem generis* canon of statutory interpretation.[27]

11 In any event, in determining the appropriate weight of the evidence, the court will consider the veracity of the statement, when it was made, whether it was made with an eye to litigation,

22 *Wong Kai Woon alias Wong Kai Boon v Wong Kong Hom alias Ng Kong Ham* [2000] SGHC 176.
23 *Wong Swee Hor v Tan Jip Seng* [2015] 1 SLR 929 at [196]–[197].
24 *Wong Swee Hor v Tan Jip Seng* [2015] 1 SLR 929 at [197].
25 *Wong Swee Hor v Tan Jip Seng* [2015] 1 SLR 929 at [197]. See also illustration (*j*) to s 32(1) of the Evidence Act (Cap 97, 1997 Rev Ed).
26 *Wong Swee Hor v Tan Jip Seng* [2015] 1 SLR 929 at [188]–[191].
27 *Re Will and Codicil of Tan Tye, deceased* [1994] 2 SLR(R) 931 at [27].

and whether there was a possibility that the statement was made with an intention to mislead.[28]

(6) Section 32(1)(j)

12 This provision modifies its predecessor and relates to statements made by individuals who, for various reasons, are unable to testify before the court in person. Under limb (i) on "dead or unfit" witnesses, no decisions have thus far provided substantial guidance on what type of "bodily or mental condition" suffices to render the witness unfit to attend as a witness before the court.[29] What is known is that even if a witness is unable to testify in person owing to physical disability, the use of remote hearings may need to be explored as a minimum step,[30] confirming the importance that remains attached to the right of cross-examination.

13 As for limb (ii) on a witness who, "despite reasonable efforts to locate him… cannot be found whether within or outside Singapore", this should not be conflated with limb (iii), which pertains to a witnesses who is "outside Singapore and it is not practicable to secure his attendance". The former should not be relied upon once the witness has been found, wherever that may be. But if the witness has been found, the proper approach is to rely on the latter.[31]

14 As for what constitutes reasonable efforts, this may be satisfied where multiple attempts have been made to contact the witness,[32] the witness's family members have been approached,[33] or the police and relevant international authorities have been engaged to locate the witness.[34] Other potentially relevant factors

28 *Re Will and Codicil of Tan Tye, deceased* [1994] 2 SLR(R) 931 at [28].
29 Some guidance of course can be drawn from s 120 of the Evidence Act (Cap 97, 1997 Rev Ed), which pertains to witness competence.
30 *Wan Lai Ting v Kea Kah Kim* [2014] 4 SLR 795 at [17].
31 *Cf Public Prosecutor v Lim Ai Wah and Thomas Philip Doehrman* [2016] SGDC 249 at [30]–[32].
32 *Public Prosecutor v Xu Feng Jia* [2016] SGDC 160 at [38].
33 *Public Prosecutor v Wang Yanyan* [2020] SGDC 139 at [9].
34 *Public Prosecutor v Shanmuga Nathan Balakrishnan* [2016] SGHC 95 at [9]; *Public Prosecutor v Tan Peng Liat, Mark* [2018] SGDC 43 at [56]–[59].

include the impact on the trial should there be a delay, the importance of the evidence of the witness, and the amount of resources required to locate the witness relative to the party's ability.[35]

15 The leading case on limb (iii) is the Court of Appeal's decision in *Gimpex Ltd v Unity Holdings Business Ltd*[36] ("*Gimpex*"). The party seeking to rely on this limb bears the burden of showing that first, the witness is outside Singapore; and second, it is impractical to secure his attendance.[37] The court will examine the likely effectiveness of any normal steps taken to secure the witness's attendance, the importance of the evidence, the degree of prejudice occasioned to the defence if admitted, and the expense and inconvenience involved in securing attendance.[38]

16 Although the requirement of reasonable efforts only appears in limb (ii), it is likely that the same standard – or due diligence – applies to limb (iii) as well.[39] However, in situations where video-link is an option, it may not be open for the party seeking to rely on limb (iii) to raise costs as a justification.[40] The current pandemic has seen the proliferation of low-barrier video-conferencing applications such as Zoom introduced for many remote hearings in the Singapore courts – though reservations remain about using them effectively for cross-examination, not least in criminal cases.[41]

17 Finally, limb (iv) deals with the admissibility of statements made by witnesses who exercise their right of non-compellability despite being competent to testify. A complication may arise if there is only a draft of the statement that was not made by the

35 Chen Siyuan & Lionel Leo, *The Law of Evidence in Singapore* (Sweet & Maxwell, 2018) at para 4.135.
36 [2015] 2 SLR 686.
37 *Gimpex Ltd v Unity Holdings Business Ltd* [2015] 2 SLR 686 at [98] and [102].
38 *Gimpex Ltd v Unity Holdings Business Ltd* [2015] 2 SLR 686 at [99].
39 *Wan Lai Ting v Kea Kah Kim* [2014] 4 SLR 795 at [17]. See also *Public Prosecutor v Dong Gui Tian* [2015] SGMC 34 at [28]–[29].
40 *Wan Lai Ting v Kea Kah Kim* [2014] 4 SLR 795 at [17].
41 See Aaron Yoong, "Zooming into a New Age of Court Proceedings" [2020] SAL Prac 19.

witness in question. In such a situation, the evidence may be inadmissible if the witness refuses to testify.[42]

(7) Section 32(1)(k)

18 This is a new provision that allows parties to the proceedings to agree on the admissibility of (hearsay) statements that are caught by s 32. Since it is usually the Prosecution who would be adducing the bulk of the (incriminating) evidence, there is little incentive for accused persons to agree.[43] Moreover, any agreement must go towards the truth of the statement's contents, and not merely its authenticity.[44]

(8) Section 32(3)

19 There is no doubt that the 2012 amendments sought to facilitate the admissibility of hearsay in both civil and criminal proceedings.[45] Section 32(3) was introduced as a check, giving the courts an option to not treat evidence relevant under s 32(1) as relevant if it is in "the interests of justice" to do so. Notwithstanding the intractable conceptual difficulties that accompany this discretion,[46] the courts have now given some guidelines on how it may be applied. *ANB v ANC*[47] was the first major case.

20 There, the husband alleged that his wife had hacked into his computer to obtain evidence of a plot to frame her during the divorce proceedings. The wife acknowledged that her actions were prohibited under various criminal law provisions, but attempted to adduce the evidence nonetheless. The case was

42 *Tradewaves Ltd v Standard Chartered Bank* [2017] SGHC 93 at [90].
43 Further, s 32(6) of the (Cap 97, 1997 Rev Ed) requires that an accused person must be represented.
44 *Goldrich Venture Pte Ltd v Halcyon Offshore Pte Ltd* [2015] 3 SLR 990 at [128].
45 See generally Chin Tet Yung, "Hearsay Reforms" (2014) 26 SAcLJ 398.
46 Chin Tet Yung, "Hearsay Reforms" (2014) 26 SAcLJ 398; Chen Siyuan, "Redefining Relevancy and Exclusionary Discretion in Sir James Fitzjames Stephen's Indian Evidence Act of 1872: The Singapore Experiment and Lessons for Other Indian Evidence Act Jurisdictions" (2014) 10(1) *International Commentary on Evidence* 1.
47 [2014] 4 SLR 747.

eventually resolved on a jurisdictional point, but the High Court made two important observations.

21 First, s 32(3) recognises that Singapore courts have an "inherent jurisdiction … to prevent injustice at trial".[48] This echoed the Court of Appeal's decision in *Muhammad bin Kadar v Public Prosecutor*, which held that evidence – statements under the Criminal Procedure Code[49] in that case – may be excluded if its probative value is outweighed by its prejudicial effect.[50] Second, s 32(3) should be given greater effect in criminal proceedings, whereas in civil proceedings the primary tool to regulate admissibility is the assignment of weight.[51] On appeal, the Court of Appeal expressed doubt over the second point, but appeared to agree with the view that the balancing test was well-suited to the nuances of and the values at stake in the criminal context.[52]

22 What was left unanswered though was whether the meaning of "prejudice" went beyond the lack of probative value – if it did not, there was nothing to balance since probative value could be resolved by looking at the relevancy criteria of the Evidence Act provisions alone. In the High Court decision of *Wan Lai Ting v Kea Kah Kim* that involved the admissibility of the affidavit of evidence-in-chief of a material witness who was based overseas, the High Court suggested that prejudice was also about the reliability of the evidence.[53]

23 This notion was built upon in *Gimpex*, where the Court of Appeal stated that other factors that could be considered include unfairness, additional costs, and the tendency to confuse or

48 *ANB v ANC* [2014] 4 SLR 747 at [50].
49 Cap 68, 2012 Rev Ed.
50 *Muhammad bin Kadar v Public Prosecutor* [2011] 3 SLR 1205. In this connection, note too that s 268 of the Criminal Procedure Code (Cap 68, 2012 Rev Ed) requires the relevance of any statement to be established independently via the Evidence Act (Cap 97, 1997 Rev Ed).
51 *ANB v ANC* [2014] 4 SLR 747 at [51].
52 *ANB v ANC* [2015] 5 SLR 522 at [29]–[30].
53 [2014] 4 SLR 795 at [19]. See also *Columbia Asia Healthcare Sdn Bhd v Hong Hin Kit Edward* [2016] 5 SLR 735 at [68]–[80].

mislead.[54] Whether even more non-epistemic factors would be added to the list remains to be seen, though on closer scrutiny, almost all of the factors pertain to either relevance (which can be resolved by the Evidence Act's relevancy criteria) or reliability (an overarching principle of the Evidence Act's admissibility paradigm). The singular exception may be unfairness, but it would seem it refers to the narrow, non-substantive version of using evidence oppressively – which again can be resolved on the epistemic basis of (Evidence Act) relevance.

24 At any rate, the applicability of the *Gimpex* factors to criminal proceedings was confirmed in *Public Prosecutor v Sutherson, Sujay Solomon*.[55] There, the accused's DNA report presented a potential hearsay issue as the original author of the report was unavailable, but the court admitted it as the Prosecution had engaged another analyst to explain its contents; any concerns about any impropriety in generating the report were therefore dispelled.[56] Likewise, in *Public Prosecutor v Chia Kee Chen*, although the statement in question was in a foreign language and recorded by a foreigner in a foreign jurisdiction, the Court of Appeal held that the reliability of the translation ensured its admissibility.[57]

B. Section 33

25 Under this provision, evidence "given by a witness in a judicial proceeding, or before any person authorised by law to take it, is relevant for the purpose of proving in a subsequent

54 *Gimpex Ltd v Unity Holdings Business Ltd* [2015] 2 SLR 686 at]106]–[120]. In this case, the court noted that the party seeking to admit the impugned document was too willing to make alterations to its report and had demonstrated sloppiness in the preparation of the document. However, the court also held that if discrepancies can be readily explained, the evidence may still be admissible. See also *Cheo Yeoh & Associates LLC v AEL* [2015] 4 SLR 325 at [94]–[97].

55 [2016] 1 SLR 632. See also *Public Prosecutor v Xu Feng Jia* [2016] SGDC 160.

56 *Public Prosecutor v Sutherson, Sujay Solomon* [2016] 1 SLR 632 at [24]. *Cf Public Prosecutor v Soh Guan Cheow Anthony* [2015] SGDC 190.

57 *Public Prosecutor v Chia Kee Chen* [2018] 2 SLR 249 at [56]. For a decision that implicitly addressed a non-reliability factor – in the form of impact on the efficacy of trial proceedings – see *Public Prosecutor v Khoo Kwee Hock Leslie* [2019] SGHC 215 at [12].

judicial proceeding, or in a later stage of the same judicial proceeding, the truth of the facts which it states, when the witness is dead or cannot be found or is incapable of giving evidence, or is kept out of the way by the adverse party, or if his presence cannot be obtained without an amount of delay or expense".

26 Whereas s 32 tends to facilitate admissibility of hearsay evidence, this provision distinctly goes the opposite direction and also pertains more clearly to a situation of hearsay. The Court of Appeal in *Teo Wai Cheong v Crédit Industriel et Commercial* ("*Teo Wai Cheong*") established very strict conditions on when s 33 can be availed: first, the party against whom the deposition is sought to be used must be the same opposing party in the prior proceedings; second, the adverse party must have had a real and non-illusory right and opportunity to cross-examine the witness in the prior proceedings; and finally, in both proceedings, the issues in question must be substantially the same.[58] The importance attached to the right of cross-examination, particularly in the light of the adversarial features of Singapore's legal system, was palpable.[59]

27 Since *Teo Wai Cheong* was a civil case, one imagines that the conditions would at the very least not be relaxed in criminal cases.[60] As to whether s 32(3) applies, there is no explicit judicial confirmation as yet, but to the extent that the interests of justice test has hitherto only been applied by courts to s 32, the answer is probably no. This is fortified by the fact that the conditions of admissibility already present a high enough bar, and any inadmissibility can be resolved via the lack of relevancy *per se*.

58 *Teo Wai Cheong v Crédit Industriel et Commercial* [2013] 3 SLR 573 at [34]–[36]. These requirements are reflected in the proviso in s 33 as well, but the court made some modifications.

59 Chen Siyuan & Nicholas Poon, "Recent Developments in Discovery in Singapore" (2014) 33(1) Civil Justice Quarterly 32.

60 For an analogous comparison, see *Lee Chez Kee v Public Prosecutor* [2008] 3 SLR(R) 447.

C. Other possible gateways

28 What the authors have looked at above concerns situations where – putting aside the fact that the Evidence Act does not define hearsay – the evidence is accepted to be hearsay, at least in its irreducible form of an out-of-court statement being tendered. There are, however, several ways in which the analysis moves away from hearsay but to some other point of relevancy. In other words, is it possible to recharacterise hearsay evidence into something else, such that other relevancy criteria apply in lieu?[61]

29 First, as alluded to earlier, s 6 of the Evidence Act permits facts forming part of the same transaction to be admitted. This is known as the *res gestae* rule, and though it has been a long-standing exception to the hearsay rule, its placement as a general relevancy provision in the Evidence Act suggests that it is also an independent, freestanding ground of admissibility. This is borne out by the jurisprudence as well, especially if the admission of the evidence gives the court a more complete picture of the relevant events.[62] In terms of the scope of the rule, unlike the common law position, *res gestae* under s 6 is much more generous as the various facts in question do not even need to occur at the same time and place. Notwithstanding this, if the hearsay rule is engaged, the court will look at whether the statements were made in circumstances of spontaneity and whether there was any possibility they were concocted.[63] This acts as a sufficient

61 As the authors had noted in their article on similar fact, this is sometimes done for similar fact too – see for instance *Public Prosecutor v Ranjit Singh Gill Menjeet Singh* [2017] 3 SLR 66.

62 See for instance *Don Promphinit v Public Prosecutor* [1994] 2 SLR(R) 1030 and *Micheal Anak Garing v Public Prosecutor* [2017] 1 SLR 748. As the authors had noted in their article on similar fact as well, taking too liberal an approach in permitting the use of general relevancy provisions over specific relevancy provisions introduces more fissures to the statutory scheme.

63 *Chi Tin Hui v Public Prosecutor* [1994] 1 SLR(R) 313 at [27]. See also *R v Andrews* [1987] 2 WLR 413 at 422–423.

safeguard against abuse, and therefore obviates any recourse to the court's discretion to not admit it.[64]

30 Beyond s 6, however, the reliance on general relevancy provisions in the hearsay context has not manifested much in case law, though arguably, the language of the provisions permits this. For instance, the aforementioned s 8 states that motive, preparation, and previous or subsequent conduct are relevant facts. In the seminal decision of *Subramaniam v Public Prosecutor*,[65] the accused was found in possession of weapons and ammunition and charged with being a terrorist. His exculpatory claim was that he had been forced by the terrorists to co-operate with them or they would kill him. This resulted in some conceptual confusion over whether the threats by the terrorists should be construed as hearsay statements since they would not be testifying in court – but the accused, as the direct receiver of the statements, was. In the end, the Privy Council decided that the accused could refer to the threats in a non-testimonial sense and hence avoid triggering the hearsay rule. But had the court referred to s 8, the evidence would have been relevant circumstantial evidence that the accused carried the weapons and ammunition under duress.[66]

31 Allied to the use of s 8 would be the state-of-mind exception. This is a common law exception that admits what is otherwise hearsay as non-testimonial, circumstantial evidence concerning a party's state of mind, for which the necessary inferences may be drawn.[67] Although this exception has never been expressly incorporated into Singapore's jurisprudence, apart from s 8, Evidence Act provisions that pertain to state of mind include ss 14 (facts showing existence of state of mind) and

64 See generally Chen Siyuan & Eunice Chua, "The Indian Evidence Act and Recent Formulations of the Exclusionary Discretion in Singapore: Not Quite Different Rivers into the Same Sea" (2018) 15 *International Commentary on Evidence* 1.

65 [1956] 1 WLR 965.

66 Chin Tet Yung, "Hearsay Reforms" (2014) 26 SAcLJ 398 at 404. Likewise, rather than perform mental gymnastics over whether there was an implied assertion or determining the appropriate person's state of mind in *Ratten v R* [1972] AC 378 and *R v Kearley* [1992] 2 AC 228, the Privy Council would have had fewer problems admitting the evidence if it had at its disposal s 9 of the Evidence Act (Cap 97, 1997 Rev Ed).

67 *R v Hendrie* [1985] 37 SASR 581 at 585; *Walton v R* [1989] 166 CLR 283 at [9].

15 (whether act was accidental or intentional). The critical thing to note, however, is that despite their titles, these are specific relevancy provisions that are meant to be used in situations of similar fact, and not hearsay. Even more importantly, both provisions set a high threshold of relevancy: in s 14, there must be a highly specific state of mind, and in s 15, there must be a clear pattern of behaviour.

32 Then there is s 11(*b*), which states that facts not otherwise relevant are relevant "if by themselves or in connection with other facts they make the existence or non-existence of any fact in issue or relevant fact highly probable or improbable". It thus serves either a corroborative or rebuttal function, and its utility is perhaps best illustrated in a factual matrix like the one found in *R v Blastland*.[68]

33 There, the accused was charged with the murder and sodomy of a boy. Strikingly, someone else had confessed to the murder even before the murder was public knowledge. The House of Lords denied the admissibility of the statement on the ground that it was irrelevant to showing the accused's state of mind, and that it was hearsay in any event. Had the Evidence Act been applicable, s 11(*b*) would have been fulfilled. Admittedly, what is less clear is whether ss 8 and 11 should be subject to a court's exclusionary discretion.[69] There is a compelling line of cases – decided before the 2012 amendments – that state that no such discretion exists generally.[70] Even if it does exist, there is little reason to believe it will take the same form as the "interests of justice" test.[71] What is also not clear is whether the hearsay rule should be "escaped" more easily when used for exculpatory, rather than inculpatory, purposes. That would make sense in

68 [1986] 1 AC 41.

69 This is with respect to usage in the context of hearsay; for similar fact, readers are invited to read the authors' article on similar fact: Chen Siyuan & Chang Wen Yee, "The Use of Similar Fact in Criminal Proceedings: An Updated Framework" [2020] SAL Prac 25.

70 See for instance *Law Society of Singapore v Tan Guat Neo Phyllis* [2008] 2 SLR(R) 239 and *Public Prosecutor v Mas Swan bin Adnan* [2011] SGHC 107.

71 See generally Chen Siyuan, "'In the Interests of Justice' as the New Test to Exclude Relevant Evidence in Singapore" (2015) 19 *International Journal of Evidence & Proof* 67.

principle, and would have avoided the controversial outcome in *R v Blastland*.

34 Finally, there is the possibility of avoiding characterising the evidence at all and simply using common sense. This is not as radical as it seems, and indeed has been done in English cases. For instance, in *R v Rice*,[72] the Prosecution wanted to adduce a used airline ticket to prove that the accused had travelled on it en route to committing an act of conspiracy. Although the Court of Criminal Appeal noted that this presented a potential hearsay issue, it chose instead to classify the ticket as "real evidence" for which the trier of fact could draw the appropriate inference; specifically, its relevance stemmed from the "common sense and common knowledge" that a used air ticket that had a name upon it was more likely than not to have been used by a man of that name.[73]

35 It should be noted, however, that if the Evidence Act is applied to situations like this, admissibility can be fulfilled through most of the general relevancy provisions and a dispute over whether s 2(2) is violated can be avoided. Moreover, the introduction of s 116A in the 2012 amendments means that electronic records now have a presumption of reliability.

III. Conclusion

36 With all of the above considerations in mind, the authors thought it would be useful (as was done in the similar fact article) to conclude by comparing and contrasting the conceptual extremes of how to facilitate the admissibility of hearsay on one end, and how to object to the admissibility of hearsay on the other – so this means some of the extremes may not necessarily be the best or most plausible argument to make as much depends on the facts of each case. Nonetheless, the table below complements the checklist exercise just undergone, and provides a visual of how opposing positions may be adopted and justified:

72 [1963] 1 QB 857.
73 *R v Rice* [1963] 1 QB 857 at 871–872. See also *R v Hendrie* [1985] 37 SASR 581 at 585.

	Admit the evidence	Object to admissibility
Prove *actus reus* generally even if hearsay	· Use a general relevancy provision ("GRP") such as ss 6, 9, and 11 as the GRPs are wide and not subject to any exclusionary discretion (*Michael Anak Garing*) · Alternatively, characterise the evidence as original or circumstantial (*Rice*) and assign weight accordingly	· Evidence that is caught by an exclusionary rule must satisfy both a general and a specific relevancy provision · Alternatively, argue that GRPs are also subject to an exclusionary discretion (*Kadar*) · Common law gateways are inconsistent with s 2(2) of Evidence Act
Prove *mens rea* generally even if hearsay	· Use GRPs or non-hearsay provisions such as ss 6, 8, 11, 14, and 15 · Alternatively, characterise the evidence as original or circumstantial and assign weight accordingly	· As above, but also argue that ss 14 and 15 are meant to be used for similar fact only
Section 32(1)(*a*)	· Use if evidence relates to death or cause of death of statement-maker	· GRP relevance must be shown · Apply s 32(3), or argue that the statement is too remote, or not probative of the circumstances leading to death. For all uses of s 32(3), the court should look beyond relevance and reliability

Section 32(1)(*b*)	· Use if evidence relates to records kept in course of business, *etc*	· GRP relevance must be shown · Statement-maker should testify · Apply s 32(3) or, where applicable, argue multiple hearsay
Section 32(1)(*c*)	· Use if evidence is made by person against his own interest	· GRP relevance must be shown · Statement-maker should testify · Apply s 32(3), or argue that the individual was not aware that the statement was against his own interest
Section 32(1)(*e*)	· Use if evidence is given by person who has special knowledge of the relationship between two persons	· GRP relevance must be shown · Statement-maker should testify · Apply s 32(3), or argue that the identity of the statement-maker is unknown, and so the statement is inadmissible
Section 32(1)(*f*)	· Use if evidence relates to existence of relationship between deceased	· GRP relevance must be shown · Statement-maker should testify · Apply s 32(3)

Section 32(1)(*j*)	· Use if evidence is given by: (a) dead or unfit witness; (b) a non-locatable witness; (c) a witness that can be located outside Singapore, but it is not practicable to call him down; or (d) a competent witness exercising his right of non-compellability	· GRP relevance must be shown · Apply s 32(3). Alternatively, for limb (i), if person is unfit, argue that video-link is possible (*Wan Lai Ting*). For limbs (ii) and (iii), argue that reasonable steps were not taken (*Gimpex*)
Section 32(1)(*k*)	· Use if evidence is agreed upon	· Agreement must go to the truth of the statement's content, not merely authenticity
Section 33	· Use if evidence obtained in the prior judicial proceedings is also adduced in subsequent proceedings	· Argue that any right or opportunity to cross-examine the witness was merely illusory, or alternatively, that justice is not served between the parties if evidence is admitted (*Teo Wai Cheong*) · Court has residual exclusionary discretion